United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1085

To be argued by
SHEILA GINSBERG

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

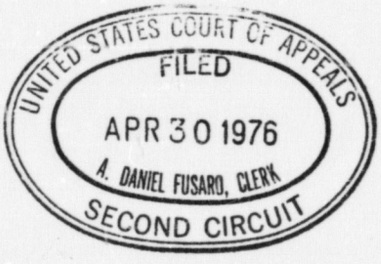
JOSE ARAUJO, JOHN DOE,
a/k/a "NENO," and
JORGITA RIVERA,

Defendants-Appellants.

Docket No. 76-1085

BRIEF FOR APPELLANT
JORGITA RIVERA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
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ON APPEAL FROM A JUDGMENT
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QUESTIONS PRESENTED

1. Whether permitting the jury to consider abundant evidence of prior similar acts of his co-defendants deprived appellant Jorgita Rivera of a fair trial.

2. Whether both the prosecutor and the trial judge improperly vouched for and bolstered the credibility of key Government witnesses so as to deprive appellant Rivera of his right to a fair trial.

3. Whether the case must be remanded for re-sentencing because appellant Rivera was penalized for going to trial and for crimes he did not commit.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Irving Ben Cooper) rendered on February 18, 1976, after a jury trial, convicting appellant Jorgita Rivera of conspiracy to make counterfeit currency, in violation of 18 U.S.C. §371 (Count I); making a plate designated for printing an obligation of the United States, in violation of 18 U.S.C. §§472 and 2 (Count II); making counterfeit obligations of the United States, in violation of 18 U.S.C. §§471 and 2 (Count III); and selling, exchanging, and receiving couterfeit obligations of the United States, in violation of 18 U.S.C. §§473 and 2 (Counts IV and IX). Rivera was sentenced to a five-year term of imprisonment on Count I and to a ten-year term of imprisonment on Counts II, III, IV, and IX, the sentences to be served concurrently.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel for appellant Rivera on his appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

I. The Trial

Appellant Jorgita Rivera and fourteen other persons were charged with a conspiracy commencing on or about January 1, 1975, to make and transfer counterfeit obligations of the United States, in violation of 18 U.S.C. §371[1] (Count I). The indictment also charged appellant Rivera with four substantive counts of violating Federal laws: making a plate designated for printing an obligation of the United States, in violation of 18 U.S.C. §§474 and 2 (Count II); making counterfeit obligations of the United States, in violation of 18 U.S.C. §§471 and 2 (Count III); and selling, exchanging, and receiving counterfeit obligations of the United States, in violation of 18 U.S.C. §§473 and 2 (Counts IV and IX). These substantive counts arose from Rivera's alleged participation in the conspiracy charged.

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[1]The indictment is B to the separate appendix to appellant Rivera's brief. Four of the defendants charged in the indictment -- Jose Araujo; John Doe, a/k/a "Nano" (appellant Hichez); John Doe, a/k/a "Chuleria" (Correa); and Feliz Irrizarri -- were tried with appellant Rivera. During the trial, Irrizarri pleaded guilty (Tr. 973), and a judgment of acquittal was entered for "Chuleria" (Tr. 1165). Araujo and Hichez were convicted along with appellant Rivera. The remaining ten were fugitives at the time of the trial or had previously pleaded guilty.

A. Evidence of Prior Similar Acts by Co-Defendants

The Government's case began with extensive testimony concerning prior counterfeiting activities in which appellant Rivera did not participate. Over strenuous and repeated objections by defense counsel (62, 78-82, 104-105, 114[2]), the witnesses for the Government were permitted to testify at length about the 1974 counterfeiting activities of Manuel Adames, Rafael Facundo,[3] Rafael Jacobo, Freddie Almeida, Felix Irrizarri, Angel Molina, and Luis Rodriguez. This testimony detailed how Adames, Facundo, Almeida, Irrizarri, and Jacobo negotiated for the purchase of counterfeit bills, processed these bills, and then passed them to merchants in and around metropolitan New York.

Manuel Adames' description of a purchase of counterfeit money from a man named "Victor" is illustrative of the testimony about the prior illegal activities of these men:[4]

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[2]Numerals in parentheses refer to pages of the transcript of the trial.

[3]Facundo was not a defendant in this case, but was charged in a separate indictment transferred from California pursuant to Rule 20, Fed.R.Cr.P. See infra at 13.

[4]Rafael Facundo (817) and Felix Irrizarri (1047) (after the latter's mid-trial guilty plea) reiterated that "Victor" was the initial source of the counterfeit money.

[ADAMES]: At the end of November of '74 I met Victor in his house in 153rd Street and River Avenue. He told me that he had a contact and was going to get counterfeit money for him. If I wanted to buy or I knew of anyone who wanted to buy, to bring it to his house.

I talked to Jacobo and with Facundo, with Felix Irrizarri, and with Freddie, and I told them I knew someone who had counterfeit money.

* * *

Facundo told me he wanted to talk to Victor and he wanted to know how much I was charging Victor for the money.

I said "Okay. I will take you to Victor's house." But I said, "I have to go first to Freddie's house and he's waiting for me. I want to get Freddie, also."

And we left, Freddie, Facundo and myself, we went to Victor's house.

Then there, in Victor's house, Freddie and Facundo asked Victor what price he was going to sell the money for.

* * *

Victor said to Facundo and to Freddie that if they would give him a hundred legal, good dollars, he would give two hundred bad dollars.

Then Freddie said that he didn't have much money for buying, and Facundo said he only had $100.

Then I said to Victor that Jacobo and Felix wanted to buy money, also.

Victor asked me, "Why didn't you bring them into my house?"

I told him that I agreed in going to pick them up, and then they were waiting for me. I left Felix, Facundo and Freddie -- I left Facundo and Freddie in Victor's

house and I went to Jacobo's house. I told him that Victor had the money and he wanted to know if he was going to buy any money.

Then Jacobo asked me, "How much is Victor selling for?"

And I said, "Victor is selling at 50 per cent."

And Jacobo told me I have to talk to Victor because that is too expensive.

I said, "Well, then let's go to Victor's house."

He said, "All right."

And we went to Victor's house.

I went to Felix' house, but Felix was not there.

We continued, Jacobo and myself, into Victor's house, and when we got there, into Victor's house, I told Victor, "This is Jacobo, who is also interested in buying money."

Then Jacobo asked Victor, "How much are you selling for?"

Victor said, "I am selling at 50 per cent because I am buying it at 40 per cent and I have to make a 10 per cent profit."

Jacobo said, "This is expensive, but I'm not going to buy much."

Then Victor said, "How much are you going to buy?" He said to Jacobo.

Jacobo said, "To begin with, I'm going to start by buying $200 good currency."

Victor said, "You have to leave me the money because I have to take it to my contact."

Jacobo said, "Okay, I will leave it to you. Tell me, what time should I come to

collect the bad money?

Victor said, "You have to come at 11 p.m. to get the money, that Jacobo could come at 11:30 to get it."

Jacobo said, "All right, it's okay."

Facundo told me that he had given $100 to Victor, and Freddie told me that he said to Victor what he had he couldn't invest in it because that is the money he had to pay his rent.

Then Victor said to Freddie that what he could do with us, with me, Facundo and Freddie, would be that he would be buying the money and we will go with him to pass the money on the street. And then he will give us an amount, to each one of us, as a participation in the profit.

And Freddie, Facundo and myself said, "That's all right, swell."

Q. What did you do after that, if anything?

A. I went with Victor driving a car to get the money that evening in 252 West, between Broadway and Riverside.

Victor told me to wait downstairs on the car, because the person where he was going to buy the money from didn't know me and he didn't like to have any stranger taken there.

I waited downstairs. About fifteen minutes later he came down with a package.

We went to 153rd Street and River Avenue in Victor's house.

Q. What happened there, if anything?

A. When we got into Victor's house, there was Freddie and Facundo waiting for Victor. They asked him if he had gotten that thing.

> Victor said, "Yes. I have it here." But he had to arrange it, arrange the money....

(47-52).

Continuing, Adames described how he, Facundo, Irrizarri, "Victor," and Freddie improved the appearance of the counterfeit bills by soaking them in coffee (52-53). Further, Adames testified that after completing that task, he, "Victor," Facundo, and Freddie spent three or four hours passing the bills in liquor and grocery stores (53-54). Illustrative of this testimony of how they successfully negotiated the bogus money is Adames' account of passing the bills in New Jersey:

> When we got into New Jersey the first liquor store that we find, I stopped a bit past it because I was driving the car and Facundo was sitting in the front of the car with me and Felix and Freddie were in the back seat. We got into the first liquor store --
>
> * * *
>
> I park a little bit ahead of the liquor store and I was carrying the money and giving it to the others, the counterfeit money, and I gave a fifty dollar bill to Freddie.
>
> Q. Counterfeit or real?
>
> [ADAMES]: Counterfeit.
>
> * * *
>
> I gave a counterfeit fifty dollar bill to Freddie. Freddie went into the liquor store and brought back a litre of whiskey. He brought the change in legal money in a bag that they had put the litre of whiskey. He threw the legal money there and left it on the seat.
>
> We arrived in another corner. There

were two liquor stores. Felix asked me to give him a fifty dollar counterfeit bill to go to the liquor store. Facundo asked me to give him another fifty dollar counterfeit bill to go to the other liquor store and to park a bit ahead past the liquor stores.

The first to return to the car was Facundo with a litre of whiskey that he had bought. He gave the change of the good currency to Freddie, threw it to the back where he was throwing the legal currency.

Felix came back and said that they didn't have change in the liquor store but he would go to the next one.

We continued and we find another liquor store and Felix said, "I will go there." He got still in his hand the $50 counterfeit bill. He went into the liquor store and he came back. He brought two litre of Cinzano and gave the change with the legal currency to Freddie who, in turn, threw it into the same bag....

(96-98).

Adames revealed that by using this technique the group negotiated approximately $2,000 in counterfeit currency in one evening by making purchases in every liquor store in the Hunts Point section of the Bronx (68). Further, Adames testified that on another occasion they passed approximately $5,000 in counterfeit money in thirty liquor stores in Manhattan (84), and on a third evening they negotiated $2,000 worth of counterfeit money in twenty liquor stores in New Jersey (95). Adames also testified about other successful ventures in New Jersey (123), in the South Bronx (155), and in Queens (168).

In toto, Adames' testimony described no fewer than seven separate counterfeiting transactions during the period. With incredible attention to details, Adames related how the three men purchased, processed, and negotiated counterfeit bills they had received from "Victor" (60-70, 72-78, 84-86), from a man named "Antonio" (87-100, 119-125), and from Angel Molina and Luis "Machete" Rodriguez[5] (150-155, 157-175).

This same scenario was described repeatedly during the Government's presentation of the testimony of Facundo (813-838), Jacobo (1014-1021), Irrizarri (1047-1051), and Freddie Almeida (1217-1222).

B. Evidence pertaining to the Crimes Charged in the Indictment

Substantially all the evidence the Government presented implicating appellant Jorgita Rivera in the crimes charged in this indictment was testimony given by alleged co-conspirators Manuel Adames, Rafael Facundo, and Freddie Almeida, all of whom had already pleaded guilty to charges arising from the counterfeiting scheme. These witnesses testified that appel-

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[5]While Jorgita Rivera was present during the negotiations and actual sale of counterfeit money from Molina and Rodriguez, the Government's own evidence showed that appellant Rivera was not involved in these deals. According to Adames' testimony, Rivera told him that River had "different business" with Rodriguez (133). Moreover, at a later date, when appellant Rivera allegedly asked Adames for some financial compensation, Adames refused it (134).

lant Rivera was one of several financial investors in the scheme to make counterfeit money (260, 263, 894, 927). They testified that Rivera contributed a total of approximately $2,000 to the project (263, 439, 448), which required substantial funds.[7] According to the testimony, Adames, Rodriguez, and Molina supervised the scheme; Federico Ruia, a/k/a "Papito," photographed the bills and made the plates; Caesar Morales was in charge of the printing (244), and Facundo constructed the darkroom and did electrical work (790, 867). The operation began in a basement apartment rented to the group by Araujo, the superintendent of a building located at 156th Street in Manhattan (274). Because of a police raid, the operation was removed to an apartment on Coster Avenue in the Bronx[8] (402, 458).

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[6]According to the Government's theory of the case, Adames and his cohorts became involved with Molina and Rodriguez when the latter two were no longer able to supply counterfeit money from their original source and after they duped Adames' group out of money intended for a purchase of counterfeit bills (189, 214-219).

[7]A printing press, printing supplies, and two cameras were purchased for the scheme. The second camera was necessary because the first had been seized in a police raid on the site of the original location of the operation, the basement of a building on 156th Street in Manhattan (402, 453).

[8]The prosecution contended that appellant Nichez, indicted under the name "John Doe, a/k/a 'Neno;'" went back to the 156th Street apartment at the behest of Adames and Rodriguez to see if the police were still there and also to bring Araujo back to them so they could inquire whether he had saved the negatives (406-426).

Adames and Facundo testified that appellant Rivera had on one occasion accompanied the group to the store at which the printing press was purchased (381-382). However, both agreed that Rivera had never been to either of the apartments used for the counterfeiting operations (338, 384).

As a result of the scheme, Rodriguez received $1,200,000 in bogus currency; Adames received $400,000; and $100,000 in counterfeit bills were allocated to Molina (482). According to Adames, Rivera was to receive $40,000 (482). Freddie Almeida testified that he later saw Rivera negotiate counterfeit money, for which Rivera received $800 (1239).

All the witnesses who testified against appellant Rivera were subject to impeachment by virtue of their own criminal status, the prospect of future prosecution and penalty, and the fact that they had previously lied to Government authorities. At the time of trial, Manuel Adames was awaiting the imposition of sentence by Judge Cooper, having entered a plea of guilty to three counts of the eight counts charged against him in the indictment (617, 625). Adames admitted he had not been indicted for the instances of passing counterfeit bills to which he testified (641) and that he would not be charged for his conceded lies to Federal authorities after his arrest (652, 657). Over objection by defense counsel (626, 631), the Government elicited that Adames had been told by the prosecutor that he could expect to benefit from his testimony only if his testimony were truthful (625). Further, Adames testified that

the same Assistant U.S. Attorney who prosecuted this case "promised" Adames that if he testified falsely, he would be prosecuted for perjury (946).

Similarly, Rafael Facundo pleaded guilty to one count of a three-count indictment. At the time of trial, Facundo had already been sentenced to the five months in prison he had already served and to a three-year term of probation. On cross-examination, it was established that Facundo had transferred some $16,000 in counterfeit bills, a fact about which he had earlier lied to Federal authorities (938-939). Moreover, although Facundo had violated his probation by an unauthorized absence from the country, he stated that he did not expect his probation to be revoked (933).

Like Adames, Freddie Almeida had pleaded guilty -- Almeida to two of five counts charged in the indictment -- and was awaiting sentencing by Judge Cooper (1214-1215).

C. Defense Motions

At the close of the Government's case,[9] defense counsel moved for a judgment of acquittal on the grounds, inter alia, that a fair trial was precluded by (1) the Government's vouching for the credibility of its key witnesses (1282-1284) and

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[9] Before the prosecution rested, it introduced testimony about counterfeit seized (1248), some exhibits of the bogus currency (1202, 1204), and expert testimony about the quality of the counterfeit bills (1254-1279).

(2) the introduction of extensive and highly prejudicial testimony concerning the prior similar acts (1285).

Judge Cooper found that a passage in this Court's slip opinion in United States v. Campanile, Doc. No. 74-2160, slip opinion 3109, 3113 (April 24, 1975),[10] was particularly appropriate to the Government's conduct of this case. That passage provided:

> Before closing this opinion, we feel compelled to comment on the conduct of the trial. Evidence that was arguably prejudicial and on the borderline of relevance was frequently admitted, as was some evidence which should have been excluded. And the Government, even though possessed of a circumstantial evidence case of overwhelming strength, still found it necessary to introduce possible extraneous and prejudicial material that could only increase the risk of reversal and a new trial. Not all the information developed by the FBI has to be presented to the jury; some is best left in the investigative files. Despite our affirmande, we do not intend that this case shall be a model for the future.

Specifically, Judge Cooper held:

> In sum, we are compelled to state that the Government came needlessly and perilously close to a dismissal on that ground alone.
>
> (1307).

Despite this assessment, Judge Cooper, obviously constrained by the expenditure of time and effort in this case, denied

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[10] Judge Cooper reached this conclusion fully aware that the passage had been deleted from the published opinion.

the motion to dismiss (1306-1307).

D. The Defense Case

Appellant Rivera did not testify or present any witnesses.[11]

E. The Judge's Charge to the Jury

In his instruction to the jurors on how they were to use the evidence of prior similar acts, Judge Cooper charged:

> ... Accordingly, in your assessment of the evidence relating to conspiracy you may consider acts and declarations by alleged co-conspirators which preceded January 1, 1975 if those acts relate to the alleged conspiracy and were in furtherance of the conspiracy. You may say, "Why was that evidence brought in? It is before the alleged commencement of the conspiracy before us."
>
> And the answer is it is not to show another conspiracy. It is to explain the particular conspiracy before you, and that therefore you may consider that evidence in order to understand the conspiracy before you. Do I make that clear? Does anybody have any doubt about that?
>
> (1566).

On witness credibility, Judge Cooper charged:

> However, it does not follow because a person has acknowledged participation in a crime or is an accomplice that he is not capable of giving a truthful version of

---

[11] Appellant Hichez testified on his own behalf (1308-1356).

> what occurred. That is for you and only you, not the Judge, not the lawyers, to determine.
>
> As with courage, so it is with truthfulness. It frequently comes from the most unlikely sources. Those from whom we rightfully expect the truth very often we find it not forthcoming, and those from whom we would hardly expect it, from them sometimes a veritable avalanche of convincing disclosure gushes forth.
>
> (1601).

This instruction was followed by Judge Cooper's comment:

> I mentioned before the tendency of human beings to lie when confronted with an accusation. You bear that in mind -- the natural instincts of people. Is that your impression from this testimony with regard to these particular people? Or did you get the impression that any one or all are nothing but unmitigated liars? That is for you. It is all right for any one of us to get up and bang away at a witness and we have got a perfect right to say that, says a lawyer, he is a rotter, unworthy of consideration at all of any kind. He is this. He is that. That is to be considered, of course.
>
> But the final analysis and the final grading is yours.
>
> (1603).

In addition, Judge Cooper told the jurors that in assessing the credibility of those co-defendants who testified, the jurors should keep in mind the fact that these witnesses knew that both the judge and the prosecutor were watching them to detect perjury. Specifically, he said:

> Or did you get the impression that he was wise enough to know that he was being carefully watched and would know that he

was carefully watched by a judge and prosecutor alike as well as by the jury and did he consider the impossibility of overcoming that enormous hurdle?

(1624).

Objection by defense counsel to this portion of the charge (1625-1626) was denied with the following explanation:

> ... All I was doing was asking them to take the true measure of that kind of a witness: Was he feeding us all because he wanted to give himself as much of a break, so to speak, or was he just inventing all of this in order to be on our good side? Was that his motive? Or is it likely -- and this is something for you to consider -- that he recognized that no matter how much he might want to lie he wouldn't dare do so because the Judge is watching what he says, the prosecutor is watching what he says, and the jury is watching what he says, and therefore he would be inclined to come forward and tell the truth. That is for you, I said, for them to consider, and that is an equally important possibility as is the possibility that the witness got on the stand and for one reason or another falsified all the way down the line.
>
> (1626-1627).

II. The Sentencing

After the jury returned its verdict finding appellant Rivera guilty of the five counts charged (1652), Judge Cooper told the jurors that those defendants who went to trial rather than plead guilty would be penalized and receive longer sentences. Specifically, Judge Cooper said:

> ... And sure, I'm going to cut off a bit when I come to sentence those who did plead guilty, and if I believe there has been cooperation, I'll take that into consideration.
>
> (1656).

A month later, at sentence, Judge Cooper stated that he had not forgotten the testimony about the various liquor store dealers in the Bronx, New Jersey, and Queens who had been cheated as a result of appellant Rivera's counterfeiting activities (1685). Rivera was sentenced to a term of imprisonment of ten years on Counts II, III, IV, and IX, and five years on Count I, the terms to be served concurrently (1686).

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[12] In contrast, Judge Cooper sentenced Adames to a term of two years' imprisonment. Irrizarri and Almeida were sentenced to two years, six months of which were to be served in a jail-type institution, and execution of the remainder was suspended and the defendants placed on probation for eighteen months. Jacobo was sentenced to two years' probation.

ARGUMENT

Point I

PERMITTING THE JURORS TO CONSIDER ABUNDANT EVIDENCE OF THE PRIOR SIMILAR ACTS BY OTHER CO-DEFENDANTS DEPRIVED APPELLANT RIVERA OF HIS RIGHT TO A FAIR TRIAL.

Over the repeated but unsuccessful objections by defense counsel, a substantial portion of the Government's direct case was directed at establishing, in lurid detail, the prior counterfeiting activities of Adames, Facundo, Almeida, Irrizarri, Jacobo, "Victor," Molina, and Rodriguez. With an extraordinary dedication to minutiae and irrelevancies, Manuel Adames inflicted his account of no fewer than seven transactions on a virtually helpless jury. Elevating trivia to new heights of importance, Adames regaled the jurors for hours with the conversations which surrounded the purchase of the counterfeit money as well as with the various comings and goings of his cohorts as they processed and then negotiated the bogus currency. Of critical importance was Adames' repeated description of the method by which the group negotiated the bills in the Bronx, Manhattan, Queens, and New Jersey. Over and over and over again Adames related, in a cadence reminiscent of the refrain to a song, how "Felix," "Facundo," "Freddie," and he bilked literally hundreds of liquor store dealers by buying

merchandise with large counterfeit bills and obtaining change in "real good currency."

Moreover, after Adames completed his version of these escapades, the sum and substance of this portion of Adames' testimony was reiterated -- perhaps for dramatic symmetry -- by Facundo, Felix, Freddie, and Jacobo.

On defense counsel's motion, Judge Cooper found that this evidence was completely unnecessary and, in fact, was so prejudicial as to bring the Government "dangerously close" to a grant of a mistrial. While the District Judge's analysis of the evidence was correct, his refusal to grant the mistrial was error.

The failure to grant a mistrial while allowing all that testimony to remain before the jury is reversible error. United States v. DeCicco, 435 F.2d 478 (2d Cir. 1970); United States v. Brettholz, 485 F.2d 483, 487 (2d Cir. 1973); McCormick, ON EVIDENCE, §190 at 453 (2d ed. 1972).

The Government, in its own case, established that appellant Rivera was not involved in these prior similar acts. He was nowhere on the scene as the Adames group negotiated the counterfeit bills obtained from "Victor" and "Antonio." And while he was indeed present when Adames purchased bills from Molina and Rodriguez, his presence was explained by his own admission that he had another deal with Rodriguez.

This Court, in reversing the convictions in United States v. DeCicco, supra, 435 F.2d at 483, articulated the legal prin-

ciple controlling in this case:

> ... Little discussion is needed to demonstrate that prior similar acts of misconduct performed by one person cannot be used to infer guilty intent of another person who is not shown to be in any way involved in the prior misconduct, unless it be under a "birds of a feather" theory of justice. Guilt, however, cannot be inferred merely by association.

Moreover, the Government cannot justify the admission of this evidence by the fact that Felix Irrizarri, one of eight people involved in the prior similar acts -- was initially on trial with appellant Rivera. The evidence simply should not have come in as to Irrizarri either. The rule in this Circuit is that the trial judge is "required to balance all the relevant factors to determine whether the probative value of the evidence outweighs its prejudical character." United States v. Brettholz, supra, 485 F.2d at 487. The standard for this balancing test, as derived from McCormick, ON EVIDENCE, §190, is

> ... not merely one of pigeonholing, but one of balancing, on the one side, the actual need for the other-crimes evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility.
>
> United States v. Brettholz, supra, 485 F.2d at 487.

Applying this standard to the facts of the trial below, it is clear that Judge Cooper erred in admitting the evidence. A candid appraisal of its case would require the Government to acknowledge that knowledge, motive, and intent were nowhere in issue. The only contest below was as to the credibility of the Government's witnesses when they asserted that appellant Rivera was one of the financial backers of the conspiracy. In this context, all the evidence as to the thievery practiced upon innocent merchants in the New York area no doubt raised the jury "to overmastering hostility."

Assuming, arguendo, that the prior acts testimony was initially admissible,[13] once Irrizarri pleaded guilty, defense counsel's standing motion to strike the evidence should have been granted. Instead, Irrizarri himself testified as to the prior activities, and his testimony was followed by Freddie Almeida's recitation and summary of the same events.

This error was fatally compounded by the affirmation by both Judge and prosecutor that the jurors were to consider this evidence against appellant Rivera in determining his motive, knowlege, and intent (Judge Cooper's charge at 1379).[14]

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[13] But see the Brettholz balancing argument supra at

[14] At the outset of his summation, the prosecutor told the jurors to consider the 1974 activities as follows:

> What was the background of this conspiracy on trial in this case? What was their motivation for coming together to manufacture counterfeit money? With what intent did

The jurors, like the Judge,[15] doubtless considered that appellant Rivera was responsible for the tremendous financial loss to innocent merchants. Because of the highly inflammatory nature of the evidence, its improper admission requires reversal.

(Footnote continued from the preceding page)

> they give money? What was their knowledge when they loaned money? Was it by accident or did they know what they were getting into? And what was their motive, or what was the motive of some of the people you have heard on the witness stand for agreeing to involve themselves together in a single manufacturing and distribution conspiracy?
>
> (1379).

[15] See Point III, infra, at 31.

Point II

THE BOLSTERING OF THE CREDIBILITY OF KEY GOVERNMENT WITNESSES BY BOTH THE PROSECUTOR AND THE TRIAL JUDGE DEPRIVED APPELLANT RIVERA OF HIS RIGHT TO A FAIR TRIAL.

Substantially all the Government's evidence implicating appellant Rivera came from witnesses who were deeply involved in serious criminal activities. Defense counsel, as was his right and duty, sought to impeach the credibility of these witnesses by eliciting for the jury the prior criminal activities of the witnesses, the fact that they expected to benefit from their testimony, and the fact that they had previously lied to Government authorities. Alford v. United States, 282 U.S. 687, 698 (1931).

For example, counsel emphasized the fact that Adames and Almeida had not yet been sentenced. Moreover, counsel revealed that Adames, who had pleaded guilty to three of the eight charges against him, had not even been indicted for any of the admitted hundreds of instances of passing counterfeit money to innocent merchants. Similarly, on cross-examination Facundo admitted that he had not been indicted for selling $16,000 worth of counterfeit bills and that despite his violation of probation he did not expect his probation to be revoked. Critically, as to Adames, Facundo, and Almeida -- all the witnesses against appellant Rivera -- counsel established that each of them had previously lied to Federal authorities.

The Government, no doubt keenly aware of the fallibility of its witnesses, sought, and was improperly permitted, to vouch for their credibility. Over objection by defense counsel, the prosecutor was permitted to elicit from Adames that this same prosecutor had promised Adames that if he lied, he would be prosecuted for perjury. The clear import of this testimony, and the effect communicated to the jury, was that the United States Government was vouching for Adames' credibility.

Judge Cooper's charge to the jury compounded this error in several ways. First, he told the jurors that in deciding witness credibility they should consider that the witnesses knew that the "judge and the prosecutor," both of whom were presumably expert in truth-detection, were watching them. Not only does this instruction explicitly bolster the witnesses' credibility, but it also carries the inherent vice of suggesting that only the judge and the prosecutor, as opposed to defense counsel, were interested in the truth.

In addition, Judge Cooper's instruction further sought to undermine defense counsel's proper attack on the testimony of these admitted accomplices. After telling the jury that truth "frequently" comes from unlikely sources, Judge Cooper went on to instruct, with regard to the fact that these witnesses had previously lied:

> I mentioned before the tendency of human beings to lie when confronted with

> an accusation. You bear that in mind -- the natural instincts of people. Is that your impression from this testimony with regard to these particular people? Or did you get the impression that any one or all are nothing but unmitigated liars?...
>
> (1603).

This instruction is the kind of error which inspired reversal in Quercia v. United States, 289 U.S. 466, 471 (1933). There, as here, the trial judge added to the evidence by putting his own experience with "human nature" in the scale against the appellant.

Because the assessment of witness credibility was pivotal to the jury's determination of appellant Rivera's guilt, the conviction must be reversed and the case remanded for a new trial.

Point III

THE CASE MUST BE REMANDED FOR RE-SENTENCE BECAUSE APPELLANT RIVERA WAS PENALIZED FOR GOING TO TRIAL AND FOR CRIMES HE DID NOT COMMIT.

A. The Penalty for Going to Trial

Immediately after the guilty verdict, Judge Cooper sought to inform the jurors about the criteria he would use to sentence the three persons who had gone to trial as well as those who had pleaded guilty. While the Judge emphasized that, before arriving at a specific sentence, he would await the presentence report on each person, he nonetheless made clear that, as a preliminary matter, the fact of having gone to trial would have a detrimental effect on the sentence he would impose. Specifically, he said:

> ... And sure, I'm going to cut off a bit when I come to sentence those who did plead guilty....

This statement reveals a general policy of penalizing those defendants who exercise their constitutional right to have criminal charges against them resolved after a trial. United States Constitution, Amendments IV and V; Scott v. United States, 419 F.2d 264, 269-270 (D.C. Cir. 1969); United States v. Tateo, 214 F.Supp. 560, 567 (S.D.N.Y. 1963) (Weinfeld, J.).

Judge Cooper's explanation of his sentencing policy in

terms of bestowing a benefit on those who plead guilty does not erase the inherent corollary of that policy, which is necessarily to penalize, by the resulting forfeiture of that benefit, those defendants who choose to go to trial. Note, The Influence of the Defendant's Plea on Judicial Determination of Sentence, 66 Yale L.J. 204, 220 (1956-1957).

A higher sentence for a defendant who exercises his Fifth and Sixth Amendment rights to trial is just as constitutionally impermissible as increasing punishment on retrial of a defendant who successfully prosecutes an appeal. North Carolina v. Pearce, 395 U.S. 711, 723-726 (1969). Consequently, this Circuit has joined the other Courts of Appeals which hold that a defendant's decision to go to trial rather than plead guilty cannot have a negative effect on the sentence subsequently imposed. United States v. Floyd, 496 F.2d 982, 989 (2d Cir. 1974); Hess v. United States, 496 F.2d 936, 938 (8th Cir. 1974); United States v. Stockwell, 472 F.2d 1186 (9th Cir. 1973); Scott v. United States, supra, 419 F.2d at 269-274 (D.C. Cir.); Baker v. United States, 412 F.2d 1069, 1073 (5th Cir. 1969); United States v. Wiley, 278 F.2d 500, 504 (7th Cir. 1960).

Whatever may be said in support of the position that a particular guilty plea which illustrates contrition merits favorable consideration at sentencing, that rationale simply does not apply to Judge Cooper's general policy "to cut off a bit" for those defendants who pleaded guilty. Authorities

recognize that the mere fact that an accused is amenable to a plea does not indicate contrition and that, in fact, it may be demonstrative of a hardened and sophisticated criminal attitude. Note, The Influence of the Defendant's Plea on Judicial Determination of Sentence, supra, 66 Yale L.J. at 210-211; Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U.Chi.L.Rev. 50, 57 n.24 (1968); Scott v. United States, supra, 419 F.2d at 271. Motivations for pleading guilty, which are varied, can have nothing to do with penitence. For example, the recidivist who is court-wise and therefore aware that some judges, despite the impropriety of such action, give favorable treatment to a guilty plea, will choose to plead guilty in order to gain the advantage of a lesser sentence. Alternatively, an accused may plead in the hope of insulating the judge from the intimate details of his participation in the crime, or he may simply seek to avoid the emotional strain of sitting through a trial. Note, The Influence of the Defendant's Plea on Judicial Determination of Sentence, supra, 66 Yale L.J. at 210-211, 218; Scott v. United States, supra.

On the other hand, the accused who insists on putting the Government to its proof does not, by that act alone, demonstrate recalcitrance or a lack of repentance. Note, The Influence of the Defendant's Plea on Judicial Determination of Sentence, supra, 66 Yale L.J. at 211; Scott v. United States, supra. There is ample and appropriate time for contrition after verdict. But see Thomas v. United States, 368

F.2d 941 (5th Cir. 1966). In this context, the fact that Judge Cooper declared his sentencing intention immediately upon hearing the verdict establishes that a genuine show of contrition was irrelevant to this aspect of the Judge's sentencing policy.

Moreover, the view that going to trial is not indicative of recalcitrance is especially appropriate in this case where appellant Rivera did not take the witness stand and present a bogus defense. Therefore, justification for the higher sentence cannot be founded on the legal theory that the sentencing judge believed that the defendant had perjured himself. See United States v. Hendricks, 505 F.2d 1233 (2d Cir. 1974).

Nor can the longer sentence be justified on the theory that appellant Rivera presented a false or dilatory defense, since in this trial Rivera merely put the Government to its proof. To be sure, it would have been more expeditious for appellant Rivera to have pleaded guilty rather than undergo the ordeal of this three-week trial.[16] However, mere expedience is simply not a valid justification for rewarding guilty pleas. United States v. Stockwell, supra, 472 F.2d at 1187; Scott v. United States, supra, 419 F.2d at 269-274; Note, The Influence of the Defendant's Plea on Judicial Determination of Sentence, supra, 66 Yale L.J. at 219-220.

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[16] The protracted length of this particular trial was anything but Rivera's fault. See Point I, supra, at 19-23.

In fact, expedience inspired by the trial judge's statement that he will reward guilty pleas is a direct violation of the interdiction against judicial involvement in plea negotiations. 18 U.S.C., Rule 11(e); see also United States ex rel. Elknis v. Gilligan, 256 F.Supp. 244, 254 (S.D.N.Y. 1966) (Weinfeld, J.).

B. The sentence here was predicated on a misapprehension of fact.

Judge Cooper explicitly stated that a primary reason for the imposition of the ten-year sentence on appellant Rivera was to punish Rivera for bilking all the innocent liquor store owners in the Bronx, New Jersey, and Queens. This explanation clearly relies on the testimony at trial about the successful negotiation of counterfeit money by the Adames group. The problem with Judge Cooper's reliance on these facts is that appellant Rivera was not responsible for any of these acts.[17]

In United States v. Malcolm, 432 F.2d 809, 816 (2d Cir. 1970), this Court made clear that:

> Misinformation or misunderstanding that is materially untrue regarding a prior criminal record or material false assumptions as to any facts relevant to sentencing renders the entire sentencing procedure invalid as a violation of due process.

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[17] See Point I, supra, at 19-23.

For these reasons, the sentence below must be vacated and appellant Rivera remanded for re-sentence. In light of the trial judge's express reasons for imposition of this sentence, concern for justice and its appearance as well requires that the case be remanded for re-sentence by a different judge. United States v. Saddler, Doc. No. 75-2130, slip opinion 2063, 2070 (2d Cir., February 20, 1976); United States v. Schwarz, 500 F.2d 1350, 1352 (2d Cir. 1974); United States v. Brown, 470 F.2d 285, 288 (2d Cir. 1972); United States v. Picard, 464 F.2d 215 (1st Cir. 1972); Manson v. United States, 463 F.2d 29 (1st Cir. 1972); see also United States v. Yagid, Doc. No. 75-1288, slip opinion 1437, 1441-1442 (2d Cir., January 5, 1976).

CONCLUSION

For the foregoing reasons, the judgment must be reversed and the case remanded to the District Court for a new trial; in the alternative, the sentence must be vacated, and appellant Rivera re-sentenced by a District Judge other than Judge Cooper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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April 30, 1976

I certify that a copy of this brief and appendix has been ~~mailed~~ to the United States Attorney for the Southern District of New York.

Sheila Gantry